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To be argued by
DUANE R. DILLS.

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APR 1
CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 569.

DAVIES MOTORS, INC., *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

DAVIES MOTORS, INC., Petitioner, *vs.* THE UNITED STATES OF AMERICA.	No. 569.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

Decision Below.

The decision of the United States Circuit Court of Appeals in this case is reported—*Davies Motors, Inc.* (*a corporation*) v. *United States of America,* 35 Fed. (2d) 928. The decision of the United States District Court is not reported, but may be found in the record (R. 26-31).

Question at Issue.

This case brings up for decision by the United States Supreme Court the question which was expressly left open in *United States* v. *One Ford Coupe,* 272 U. S. 321; *Port Gardner Investment Co.* v. *United States,* 272 U. S. 564, and *Commercial Credit Company* v. *United States,* 276 U. S. 226. The question presented is whether or not it is mandatory under Section 26 of the National Prohibition Act, Title 2 (Chapter 85, Act Oct. 28, 1919; 41 St. L. 305, 315;

27 U. S. C. A., Sec. 40) that an automobile used to unlawfully transport intoxicating beverage liquor be seized and proceeded against under said statute, and under which statute the rights of innocent lienors are protected, or may such an automobile be proceeded against and forfeited under Section 3450 of the Revised Statutes (26 U. S. C. A., Sec. 1181) for the deposit and concealment of intoxicating liquor with intent to defraud the United States Government of taxes due thereon, and under which statute the rights of innocent lienors are disregarded and absolutely forfeited.

The first assignment of error in the appeal to the Circuit Court, and which is the first assignment of error included in the specifications of error before this court, is sufficiently broad to justify a review of the other points considered but not decided, and upon which this court sharply divided in *United States* v. *One Ford Coupe*, 272 U. S. 321, if this court feels disposed to reconsider those questions.

Statutes Involved.

National Prohibition Act, Title II, Sec. 26, Chap. 85, Act Oct. 28, 1919; 41 St. L. 305, 315; 27 U. S. C. A., Sec. 40.

> "Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or auto-

mobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this chapter in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week

for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts."

R. S., Sec. 3450, 26 U. S. C. A., Secs. 1181, 1182:

"SEC. 3450. REMOVING AND CONCEALING ARTICLES WITH INTENT TO DEFRAUD UNITED STATES OF TAX—FORFEITURE AND PENALTY. Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying and forfeited under

any of the provisions of this Title, and all condemned material, together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material, suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spiritous liquors, which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct."

Other Pertinent Statutes.

41 Stat. L. 305, 317, 27 U. S. C. A. 52.

SEC. 35. All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax stamps for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person

from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

SUPPLEMENTAL ACT OF 1921.

Chap. 34, Act Nov. 23, 1921, 42 Stat. L. 222, 223, 27 U. S. C. A. 3, 53, 54, sometimes called the Willis Campbell Act.

SEC. 5. That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

If distilled spirits upon which the internal revenue tax has not been paid are lost by theft, accidental fire, or other casualty while in possession of a common carrier subject to the Transportation Act of 1920 or the Merchant Marine Act, 1920, or if lost by theft from a distillery or other bonded warehouse, and it shall be made to appear to the

commissioner that such losses did not occur as the result of negligence, connivance, collusion, or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or tax penalties that may have accrued since the passage of the National Prohibition Act or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Title III of the National Prohibition Act."

Statement.

The facts relative to the seizure of the automobile in question are given in the findings of fact and conclusions of law of the District Court (R. 26-30), and are as follows:

"I.

That on or about the 27th day of September, 1928, Paul L. Mathias was and is a duly authorized and Acting Agent of the Commissioner of Prohibition of the United States;

II.

That on or about the 27th day of September, 1928, in the City of Fresno, County of Fresno, and within the Northern Division of the Southern District of California, the said Paul L. Mathias, acting on behalf of and for the said Commissioner of Prohibition of the United States, seized a certain Willys-Knight Roadster automobile, Engine No. 27-260, being the

same automobile as is the respondent in the above named libel;

III.

That at the time the said respondent automobile was seized, as aforesaid, there was concealed and deposited therein, certain goods, merchandise and commodities, to-wit: Five (5) Pints of distilled spirits; that the said distilled spirits were fit for beverage purposes and then and there contained more than one-half of one per cent of alcohol by volume; that there was due upon the said Five (5) pints of distilled spirits, certain taxes imposed by the Act of November 23, 1921, known as the Willis-Campbell Act, and by the Revenue Act of 1921; that at the time when the said distilled spirits were concealed and deposited in the said automobile, as aforesaid, the taxes due thereon were unpaid and still remain unpaid; that there were no marks, stamps or labels on the said bottles of said distilled spirits to indicate that said taxes due thereon had been paid;

IV.

That the facts of the seizure are as follows: That on the evening of September 27, 1928, Agent Paul L. Mathias stationed himself in the rear of the Sequoia Hotel in the City of Fresno, State of California, and there saw one Hans P. Mortensen, alias H. P. Bender, in the act of removing Five (5) Pints of Mexican Smuggled Whiskey, bearing the label "Border Bell Bourbon Whiskey, etc.", from the said respondent automobile; that the said Mortensen had deposited and concealed the said smuggled whiskey in the respondent automobile with the intent to defraud the United States Government of the taxes due thereon; in violation of the provisions of Section 3450 Revised Statutes; that at the time of the arrest, the respondent vehicle was being used by said

Mortensen for the purpose of transporting the liquor seized therein;

V.

That on the 3rd day of October, 1928, the said Paul L. Mathias swore out a complaint before Samuel F. Hollins, United States Commissioner at Fresno, California, in which he charged that the said Hans P. Mortensen, alias H. P. Bender, did, on the 27th day of September, 1928, unlawfully possess and transport Twelve (12) one pint bottles of intoxicating liquor; that on the 19th day of November, 1928, an Information was filed charging the said Hans P. Mortensen with violation of Section 3450 Revised Statutes; that on the 21st day of November, 1928, the said Hans P. Mortensen was arraigned upon said charge and pleaded guilty to violating the criminal provisions of Section 3450 Revised Statutes, and was fined in the sum of Two Hundred Fifty Dollars ($250.00) for the violation thereof;

VI.

That the Davies Motors, Inc., is a corporation, organized and existing under and by virtue of the State of California, and authorized to do business and is doing business as a dealer in Willys-Knight automobiles, in the City of San Diego, State of California;

VII.

That on the 3rd day of May, 1927, Mrs. H. P. Mortensen purchased from said corporation a Willys-Knight automobile under a conditional contract of sale, pursuant to which said corporation retained the title thereof until the purchase price should have been fully paid; that at the time of said sale, said corporation, in accordance with its custom, required and secured a credit statement from said purchaser in

which said purchaser alleged that H. P. Mortensen, her husband hereinabove mentioned, was engaged in the interior decorating business on his own account and had been so engaged for a period of eight years; that as assets said purchaser listed a house and lot in Omaha, Nebraska, of the then value of Eight Thousand Dollars ($8,000.00) and also gave two references, both of which said corporation investigated and found satisfactory; that said purchaser made the payments on said car regularly and on the due date, and on June 22, 1928, at the solicitation of one of the said corporation's salesmen, said purchaser traded in the Willys-Knight automobile purchased on May 3, 1927, and purchased the Willys-Knight Roadster, engine #27-260, referred to above, on conditional sales contract under and pursuant to the terms of which said corporation retained the title thereto until all payments should have been completed; that the sale price of the said Willys-Knight Roadster purchased on June 22, 1928, was Thirteen Hundred Ninety-Five ($1395.00) Dollars; that under the sale contract entered into between the purchaser and the said Davies Motors, Inc., the purchaser was required to make payments in the sum of Fifty-Seven Dollars ($57.00) per month, commencing on July 22, 1928; that the net balance due on the said July 22, 1928, after allowing deductions for the trade in value for another car was Eight Hundred Ninety-Six Dollars ($896.00); that the payment due on July 22, 1928, was not paid and that the claimant herein ascertained that the purchaser and her husband, H. P. Mortensen, had moved to Fresno, California, and thereupon demand was made upon the purchaser, and part of the said Fifty-Seven Dollars ($57.00) was paid on August 6, and the balance thereof on August 7, 1928;

VIII.

That Davies Motors, Inc., Claimant herein, had no notice that said automobile was being used for illegal purposes, as charged in this Libel, or otherwise, and knew of no facts or circumstances which would reasonably or otherwise lead them to believe that the automobile was being so used; that the Davies Motors, Inc., is now and at all times mentioned, the legal owner of said Willys-Knight automobile; that no payments have been made under and pursuant to the aforementioned conditional sale contract since the 7th day of August, 1928, and that the said Davies Motors, Inc., is under and pursuant to the terms thereof entitled to the immediate and exclusive possession of said automobile and to all legal and equitable rights therein as the exclusive owner thereof.

FROM THE FOREGOING FACTS THE COURT FINDS AS CONCLUSIONS OF LAW:

I.

That the above named vehicle should be forfeited to the United States of America for violation of the provisions of Section 3450 Revised Statutes:

That the Libelant, United States of America, should recover from the Intervenor and Claimant, Davies Motors, Inc. its costs of suit and the storage and warehouse charges properly incurred since the date of seizure."

It was stipulated by counsel when the case was before the Circuit Court of Appeals that the word "smuggled" should be stricken from the record with the same effect as if that word had been omitted entirely, so that whenever the term "Mexican smuggled whiskey" appears, it should read instead "Mexican whiskey", as no question was raised at the time with reference to smuggling the liquor into the United States (R. 49-50).

On September 27, 1928, the said automobile (Willys-Knight Roadster, Engine No. 27-260) was seized by a prohibition agent named Mathias. It was stipulated that Mortensen, the operator of the automobile, would have testified that he drove the automobile to the back of the Sequoia Hotel, just prior to its seizure with the liquor found therein, and it was stipulated that Mathias, the prohibition agent, would have testified that when he arrived at the rear of the hotel to make the seizure, the automobile was standing still, and at the time when the seizure was actually made, it was not in motion (R. 22). On October 3, 1928, an affidavit of complaint (Exhibit A, R. 18) was filed by Mathias, prohibition agent, against the said Mortensen, the driver of the automobile, for wrongfully and unlawfully possessing and transporting the intoxicating liquor in violation of the Act of October 28, 1919. A warrant was issued against the said Mortensen on October 3, 1928, upon said complaint, in which the said Mortensen was charged with possessing and transporting intoxicating liquor (Exhibit B, R. 19). On October 5, 1928, the said Mortensen was arrested under said warrant and produced before the United States Commissioner (Exhibit C, R. 20). On November 19, 1928, an information was filed against the said Mortensen, charging him with violation of Section 3450 Revised Statutes, and on November 21, 1928, he was arraigned upon said charge and pleaded guilty, and was fined $250.00 (See Paragraph V, Stipulation of Facts, R. 22-23). On January 2, 1929, a libel was filed against the said automobile, in which it was alleged that the said Mortensen, the driver of the automobile, had concealed and deposited the intoxicating liquor, with intent to defraud the United States of the taxes due and imposed thereon by the Act of November 23, 1921,

known as the Willis-Campbell Act of 1921, and which taxes had not been paid (See Count I of the Libel, R. 3-4). The libel also contained a second count, charging that the automobile had been used to smuggle liquor into the United States (Count II of the Libel, R. 5), but this count was not raised at the trial (See Stipulation, R. 49-50). On January 22, 1929, a complaint in intervention was filed by the Davies Motors, Inc., petitioner herein (R. 7-12), in which were alleged the facts concerning the purchase of the automobile and the title of the petitioner therein, and the innocence of the petitioner with respect to a violation of the prohibition or the revenue laws, and raising the issue that at the time of the arrest and confiscation the said Mortensen was transporting in the said automobile the intoxicating liquor, and that the said Mortensen had been arrested upon a warrant and taken into custody for transporting the intoxicating liquor contrary to the Act of October 28, 1919 (See Paragraphs 8, 9 and 10 of the Complaint in Intervention, R. 10-11). Attached to said complaint in intervention was a copy of the conditional sale contract under which Mrs. H. P. Mortensen had purchased the automobile from Davies Motors, Inc., petitioner herein (R. 12), and in which it was provided in the fourteenth paragraph thereof that the automobile should not be used for the transportation of intoxicating liquor or used in or to the violation of any laws of the United States; that any violation of such provision would forthwith terminate the contract, and all the rights of the purchaser therein should thereupon be immediately forfeited, and that the petitioner herein would thereupon be alone and solely entitled to the possession of the automobile (R. 16).

The case was submitted to the United States District Judge for the Southern District of California for decision on a stipulation of facts (R. 20-25), and upon which the District Court made its findings of fact and conclusions of law hereinbefore set forth.

Specifications of Error.

The assignment of errors relied upon by your petitioner in the appeal to the Circuit Court, and which are urged before this court, are as follows (R. 35-36):

"I.

That the Honorable Court erred in its conclusions of law, in that it concluded that the respondent automobile herein should be forfeited to the United States of America for a violation of the provisions of Section 3450 Revised Statutes.

II.

That the Honorable Court herein erred in that in its conclusions of law it concluded that the United States of America should recover from the intervener-claimant, Davies Motors, Inc., its costs of suit herein incurred and its storage and warehouse charges incurred since the date of seizure.

III.

That the Honorable Court erred in its decree entered herein in this, that said decree ordered, adjudged and decreed that the judgment be for the libelant and that the respondent automobile be declared forfeited to the libelant and that said libelant recover its costs of action for storage charges

from the intervener and that said decree and all thereof was contrary to law and should have been rendered in favor of Davies Motors, Inc., the intervener, dismissing said libel and said respondent automobile, and ordering said respondent automobile released to the intervener free from all claim of the libelant."

Preliminary Statement.

Very little, if anything, of substance can be added to the arguments which counsel for this petitioner urged when he appeared before this court as counsel in the cases of:

United States v. *One Ford Coupe,* 272 United States 321;

Port Gardner Investment Co. v. *United States,* 272 U. S. 564;

Commercial Credit Company v. *United States,* 276 U. S. 226.

The arguments pro and con are reviewed exhaustively in the majority opinion written by Mr. Justice Brandeis and in the dissenting opinion written by Mr. Justice Butler, in *United States* v. *One Ford Coupe.* All opinions of the various District and Circuit Courts, as well as of the Supreme Court, decided up to that time, are fully and chronologically referred to and discussed in both the majority and dissenting opinions in that case.

The confusing decisions in the District and Circuit Courts since the decision of the United States Supreme Court in the cases above referred to seem to be largely dependent upon whether or not the judges in those cases are sympathetic with the point of view expressed by Mr.

Justice Brandeis, or with the point of view expressed by Mr. Justice Butler. The Second and the Fifth Circuits refer to the dissenting opinion of Mr. Justice Butler, and make his views the law in those circuits.

See

United States v. *General Motors Acceptance Corporation* (C. C. A. 5), 25 Fed. (2d) 238;
Commercial Credit Corporation v. *United States* (C. C. A. 2), 18 Fed. (2d) 927.

The Fourth Circuit endorses the view of Mr. Justice Brandeis.

See

General Motors Acceptance Corporation v. *United States* (C. C. A. 4), 23 Fed. (2d) 799;
United States v. *Commercial Credit Company* (C. C. A. 4), 20 Fed. (2d) 519;
Richbourg Motor Company v. *United States* (C. C. A. 4), 34 Fed. (2d) 38, which is now case No. 452 before this court.

The Ninth Circuit, since the decision of the United States Supreme Court in *United States* v. *One Ford Coupe,* has followed the views of Mr. Justice Brandeis. The present views of that court are expressed in *Davies Motors, Inc.* v. *United States,* Case No. 569, now at bar. That circuit has drawn fine distinctions in cases it has considered since the decision of the Supreme Court in *Commercial Credit Company* v. *United States,* reversing that circuit.

See

United States v. *One Studebaker*, 32 Fed. (2d) 866;

Commercial Credit Company v. *United States*, 33 Fed. (2d) 228.

Prior to the decisions of the United States Supreme Court, however, that circuit had expressed views in sympathy with those of Mr. Justice Butler.

See

McDowell v. *United States* (C. C. A. 9), 286 Fed. 521;

Studebaker v. *United States* (C. C. A. 9), 289 Fed. 256.

Confusion as to the applicable law continues throughout the District Courts, in all of which such cases are blocking the calendars. The automobile dealers are anxious to know their rights and remedies; the manufacturers seek guidance; and the finance companies, banks and bankers are desirous of ascertaining the legal risks involved. It is hoped, therefore, that this case will give this court the opportunity to clearly state the law.

ARGUMENT.

I.

Proceedings under Section 26 of the National Prohibition Act were mandatory.

The District Court found as a fact that there was both transportation of intoxicating liquor in violation of the National Prohibition Act, and concealment of the liquor with intent to defraud the United States of a tax thereon in violation of Section 3450. The finding was as follows:

> "* * * that the said Mortensen had deposited and concealed the said smuggled whiskey in the respondent automobile with the intent to defraud the United States Government of the taxes due thereon; in violation of the provisions of Section 3450 Revised Statutes; that at the time of the arrest, the respondent vehicle was being used by the said Mortensen for the purpose of transporting the liquor seized therein" (Finding of Fact, Paragraph IV, R. 27).

This court and the Circuit Courts of Appeal should not review findings of fact by the District Court.

See

N. Y., L. E. & W. R. R. Co. v. *Winter's Admtr.*, 143 U. S. 60;

Aetna Life Insurance Company v. *Ward*, 140 U. S. 76;

Wilson v. *Everett*, 139 U. S. 616.

Furthermore, since no objection was taken in the court below to the finding of fact by the government, it will not be considered in the Supreme Court.

See

Clark v. *Fredericks*, 105 U. S. 4;
Springer v. *United States*, 102 U. S. 586;
Wilson v. *McNamee*, 102 U. S. 572.

That finding, moreover, is justified by the stipulation of fact in the case, which reads as follows:

> "* * * It is stipulated that Hans P. Mortensen would testify that on the night in question, just prior to the seizure, he drove up to the back of the Sequoia Hotel in the respondent automobile in which liquor was found; it is further stipulated, however, that Paul L. Mathias, prohibition agent, would testify that when he arrived at the rear of the hotel to make the seizure, the Willys-Knight automobile was standing still, and at the time when the seizure was actually made it was not in motion" (Stipulation, Paragraph IV, R. 22).

The stipulation with reference to the seizure itself reads as follows:

> "* * * That on the evening of September 27, 1928, Agent Paul L. Mathias stationed himself in the rear of the Sequoia Hotel in the City of Fresno, State of California, and there saw one Hans P. Mortensen, alias H. P. Bender, in the act of removing five pints of Mexican smuggled whiskey bearing the label "Border Bell Bourbon Whiskey, etc." from the said respondent automobile" (Stipulation, Paragraph IV, R. 22).

In other words, the agent did not see any act of concealing, but on the contrary saw an act of exposing. Since Mortensen was removing the liquor from the autobile, and an automobile is a vehicle generally used for

transportation, it was proper for the agent to conclude that he had discovered Mortensen in possessing the liquor incident to transportation. That this was his conclusion is borne out by the fact that he then and there seized the automobile for violation of the National Prohibition Act, and later, on October 3rd, he made an affidavit of complaint against Mortensen for unlawfully possessing and transporting the liquor (Exhibit A, R. 18), and had a warrant issued against him for such offense (Exhibit B, R. 19). As a matter of law, the prohibition agent, Mathias, was justified in considering that he had "discovered" Mortensen possessing intoxicating liquor incidental to transportation. This court, by Mr. Chief Justice Taft, has held with respect to the language used in Section 26 of the National Prohibition Act as follows:

> "The language of the section provides for seizure when an officer of the law 'discovers' anyone in the act of transporting the liquor by automobile or other vehicle. Certainly it is a very narrow and technical construction of this word which would limit it to what the officer sees, hears and smells as an automobile rolls by, and exclude therefrom, when he identifies the car, the convincing information that he may previously have received as to the use being made of it." (*Carroll* v. *U. S.*, 267 U. S. 132, at 158.)

And in *United States* v. *One Buick Coach Automobile,* 34 Fed. (2d) 318, at 320, the District Court for the Northern District of Indiana says, with respect to this section of the law:

> "The argument that the agents did not see the automobile containing the liquor while it was in motion, and therefore did not discover the act of transportation, is extremely technical.

> "'Discover,' according to Webster's New International Dictionary, means to lay open to view; to reveal; to make known of, as of a thing existing already, but not perceived or known; to find out; to ascertain; to espy; to detect. Transportation was revealed to them when they found Cowan with the liquor and automobile under the circumstances heretofore described. They certainly found out and ascertained that Cowan had used and was using the automobile to transport liquor unlawfully. They in very truth espied and detected him in such juxtaposition to the liquor and car that they could infer nothing else than that he transported the liquor in the car."

Since there was transportation and the District Court so found, it follows that if the language of Section 26 of the National Prohibition Act is mandatory, the forfeiture proceedings should have been under that statute, wherein the innocent lienor could have asserted his rights. Throughout that statute, the imperative word "shall" instead of the permissive word "may" is used. Even though the word "may" had been used, it would have followed as a matter of law that the Government nevertheless would have been required to proceed under that statute because the innocent rights of third parties are involved. With respect to the use of such words, this court has held, in *Mason* v. *Fearson*, 50 U. S. 248, at 259 (9 Howard), as follows:

> "The form of expression adopted here, it must be remembered, is employed in laws, and not contracts, and of course, if a well established construction had been before given to it in laws by the courts under certain circumstances, it must be presumed to have been well known, and intended here under like circumstances. What are these circumstances?

Whenever it is provided that a corporation or officer 'may' act in a certain way, or it 'shall be lawful' for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons.

"Thus, in Rex & Regina *v.* Barlow, 2 Salkeid, 609, 'Where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall"; thus, 23 Hen. 6 says the sheriff *may* take bail; this is construed he *shall*, for he is compellable so to do.' Carthew, 293.

"On this, see further The King *v.* The Inhabitants of Derby, Skinner, 370; Backwell's cases, 1 Vernon, 152-154; 2 Chitty, 251; Dwarris on Stat. 712; Newburgh T. Co. *v.* Miller, 5 Johns. Ch. 113; City of New York *v.* Furze, 3 Hill, 612, 614; Minor *et al v.* The Mechanics' Bank, 1 Peters, 64. Without going into more details, these cases fully sustain the doctrine, that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. The power is conferred for their benefit, not his; and the intent of the legislature, which is the test in these cases, seems under such circumstances to have been 'to impose a positive and absolute duty'. But, under other circumstances, where the act to be done affects no third persons, and is not clearly beneficial to them or the public, the words 'may' do an act, or it is 'lawful' to do it, do not mean 'must', but rather indicate an intent in the legislature to confer a discretionary power. Malcolm *v.* Rogers, 5 Cowen, 88; 1 Peters, 64; 5 Johns. Ch. 113."

And in *Ralston* v. *Crittenden,* 13 Fed. 508, the Circuit Court holds as follows:

> "In substance it is claimed that in so far as the rights of complainants are concerned the state officers were at liberty to disregard the act. In this view I do not concur. Even if the terms of the statute were permissive only, and meant no more than the words generally employed in statutes importing a grant of authority or power to a public officer to do a certain act, still it is well settled that all such acts are to be construed as mandatory, whenever the public interests *or individual rights* call for the exercise of the power conferred. Sup'rs. *v.* U. S., 4 Wall. 435; Galena *v.* Amy, 5 Wall. 705; McDougall *v.* Peterson, 11 C. B. 755; 15 Op. Atty. Gen. U. S. 621." (Italics are those of the court and not ours.)

In the arguments before this court in the *Ford Coupe, Port Gardner Investment Company,* and the *Commercial Credit Company cases,* the Solicitor General urged that the word "shall" in Section 26 should be construed as "may", citing cases such as *Railroad Company* v. *Hecht,* 95 U. S. 168, in support of that argument. It is true in such cases where the rights of innocent parties or the public were not involved, that the word "shall" is construed as "may", for the reasons set forth in *Mason* v. *Fearson, supra;* but where the rights of third parties or the public are involved, the converse is true, as we have seen by that case that "may" would be construed as "shall". However, it is unnecessary to examine those cases at length, because there is a clearer illustration of the mandatory effect of the word "shall" in Section 3450 itself. It is because of the mandatory feature of that statute that this court has given full effect to the forfeitures provided for therein, although the forfeitures against innocent parties were harsh and unjust. If the word "shall" in that statute could have been construed as "may" it is apparent from the expressions in the

opinions of this court that forfeitures of the property of innocent parties would not have been enforced in *Dobbin's Distillery* vs. *United States,* 96 U. S. 395; *Henderson Distilled Spirits,* 14 Wall. 44, 81 U. S. 44; *Goldsmith-Grant Co.* vs. *United States,* 254 U. S. 505, and the other cases of like effect.

With respect to Section 26 of the National Prohibition Act, counsel in the case at bar quotes as follows from the briefs filed by him when he was counsel before this court in the *Ford Coupe, Port Gardner Investment Company* and the *Commercial Credit Company* cases:

> "The provisions of that section are specific and mandatory, and require—
>
> (a) That the officer upon seizing the intoxicating liquor transported or illegally possessed shall—
>
> 1. Take possession of the automobile.
>
> 2. Arrest the person in charge thereof.
>
> 3. Proceed against the person arrested under the provisions of the National Prohibition Act.
>
> (b) The court, upon conviction of the person, shall—
>
> 1. Order the liquor destroyed.
>
> 2. Order the public sale of the automobile, unless good cause to the contrary is shown by the owner thereof.
>
> (c) The officer carrying out the execution of the court shall—
>
> 1. After deducting certain expenses provided for in the statute, pay all liens according to their priority, which shall be established by intervention or otherwise; and further that

> all liens against the property sold shall be transferred from the property to the proceeds of sale."

This court has held in the *Port Gardner Investment Company* case that after conviction for transportation of the individual, the mandatory language of Section 26 requires forfeiture proceedings under its provisions; and in the *Commercial Credit Company* case this court again held that where the individual was arrested and convicted of possession that nevertheless the mandatory features of Section 26 were applicable because the possession was incident to transportation. If the requirements of that section are compulsory in the event of conviction of the individual under the National Prohibition Act, they are equally compulsory whether or not the individual has been arrested or convicted. The language of the statute remains the same.

See *United States* v. *One Reo Truck* (C. C. A. 2), 9 Fed. (2d) 529, where the court says:

> "Now Revised Statutes Section 3450, at least as matter of logic, may still be in force as against the owner and mala fide lienors, but it cannot be in force against bona fide lienors when the offender has been convicted. That would result in a stark contradiction between the two statutes. Nor is it possible to say that it might be in force against bona fide lienors, when the offender is not convicted. The statute cannot mean different things at different times. If it does not cover such liens when the offender has been convicted, it does not cover them when he has not. It would be preposterous to say that the failure to convict an offender exposed the bona fide lienor to a penalty from which he would be exempt in case of conviction."

The following Circuit Courts have held that in view of the decisions of this court in the *Ford Coupe, Port Gardner Investment Company* and *Commercial Credit Company* cases, Section 26 is mandatory:

Commercial Credit Corporation vs. *United States*, 18 Fed. (2d) 927;
United States v. *General Motors Acceptance Corporation* (C. C. A. 5), 25 Fed. (2d) 238,

but the Fourth and Ninth Circuit Courts, on the other hand, have held in the cases at bar, No. 452 and No. 569, that in view of the decisions of this court in those cases, that the language is not mandatory.

Mr. Justice Brandeis, in the *Ford Coupe* case, expresses no opinion as to whether or not Section 26 is mandatory, but Mr. Justice Stone in his concurring opinion in the *Ford Coupe* case definitely states that the language is mandatory, for he there says:

> "In that case Section 26, it seems to me, plainly directs that the seizure shall be made and proceedings for forefeiture of the seized vehicle had under that section. In that event Section 26 saves the interests of the innocent owner or lienor from forfeiture required by Section 3450."

Mr. Justice Butler, in his dissenting opinion in the *Ford Coupe* case, in which he was joined by Mr. Justice McReynolds and Mr. Justice Sutherland, and again in his concurring opinion in the *Port Gardner Investment Company* case, in which he was joined by Mr. Justice Stone, upholds the mandatory feature of Section 26, for in the latter case he says:

> "The substance of that question is whether the prohibition officer discovering one in the act of trans-

portation, may disregard the plain and direct command of Section 26 to proceed against the vehicle as there directed."

It is submitted, therefore, that the law requires, justice compels and common sense dictates that the seizure should be under Section 26 of the National Prohibition Act instead of under Section 3450 of the Revised Statutes.

II.

It is not a question of election but of direction that requires forfeiture under Section 26 of the National Prohibition Act.

In the case of *Richbourg Motor Company* v. *United States* (Case No. 452 at bar) the Circuit Court of Appeals for the Fourth Circuit in its decision, 34 Fed. (2d) 38, considers the question entirely from the point of view as to whether an election of remedies had been made, and it refers to its previous decision in *United States* v. *Commercial Credit Company*, 20 Fed. (2d) 519, and *General Motors Acceptance Corporation* v. *United States*, 23 Fed. (2d) 799. In both of these cases, as well as the *Richbourg Motor Company* case, at bar, and particularly the case of *United States* v. *Commercial Credit Company*, where Circuit Judge Parker considers the question, there is a reasonable and convincing discussion showing that the United States attorney should not be bound by an election made by the prohibition officer in seizing the car. We accept that reasoning. Notwithstanding the fact that in the *Davies Motors* case, No. 569 at bar,—that the prohibition agent seized the car for violation of the National Prohibition Act, filed

an affidavit of complaint alleging violation of the prohibition law for the transportation of liquor, had Mortensen, the driver of the car, arrested and held before the commissioner on a warrant charging transportation in violation of the National Prohibition Act, nevertheless we do not base our case upon the technicality that such acts by the prohibition agent constituted such an election that in a proper case the District Attorney would thereby be precluded from proceeding under another statute, if that statute were applicable.

The Ninth Circuit, in the consideration of the *Davies Motors* case, No. 569 at bar, likewise cites Section 838 of the Revised Statutes (19 Stat. 241; 28 U. S. C. A. 486) and the decisions of the Supreme Court in the *Confiscation Cases*, 74 U. S. 454 (7 Wall.), to establish the point that in an election of remedies, the District Attorney cannot be precluded because of a supposed election previously made by the prohibition agent in seizing the car. That is not the point at issue. Section 838 of the Revised Statutes merely states the powers and duties of the District Attorney, when in a proper case the Internal Revenue Collector reports an offense to his office. That statute does not authorize or direct the District Attorney to ignore the mandates of Congress; it merely embraces his duties and authority in proper cases. This court, in the *Confiscation Cases*, 74 U. S. 454, at 457 (7 Wall.), in holding that prosecutions are exclusively within the jurisdiction of the District Attorney, makes an exception as to those cases wherein Congress provides otherwise. Mr. Justice Clifford there says:

> "Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, and even

> after they are entered in court they are so far under his control that he may enter a *nolle prosequi* at any time before the jury is impanelled for the trial of the case, *except in cases where it is otherwise provided in some act of Congress.*" (Italics ours.)

It is not the act of the prohibition agent or the act of the United States attorney that makes the election under which statute forfeiture proceedings shall be brought. It is the enactment of Congress itself which makes the election. We do not contend that the District Attorney is precluded because of some election made by an agent in arresting or seizing the car, but we do maintain that the District Attorney has no more right than the prohibition agent to disregard the plain commands of Section 26 of the National Prohibition Act. It is not a question of election, but rather one of positive direction by Congressional enactment. As was said in *United States* v. *One Dodge Sedan* (*Commercial Investment Trust, Intervenor*), 21 Fed. (2d) 971, at 973:

> "I hold that where the circumstances appear by the evidence that there was an unlawful transportation in violation of the National Prohibition Act, the prosecuting officer is not permitted by mere caprice to drop from his prosecution the unlawful transportation so as to avoid the consequences of the forfeiture proceedings authorized by Section 26 of that act * * *."

and as Mr. Justice Butler says in his concurring opinion in *Port Gardner Investment Company* v. *United States*, *supra*:

> "I think he has no more right to ignore that command than he has to let the liquor and offender go. The law makes the election."

The holding of this court in *Commercial Credit Company* v. *United States, supra,* by Mr. Justice Sanford, would seem to support the same view.

III.

Section 3450 is in conflict with Section 26 of the National Prohibition Act, and therefore was not re-enacted by the Willis-Campbell Act.

It seems to be accepted by Mr. Justice Brandeis in the majority opinion and Mr. Justice Butler in the minority opinion in the *Ford Coupe* case that unless Section 3450 of the Revised Statutes was re-enacted by the Willis-Campbell Act (Supplementary Act of 1921, Chapter 34, Act of November 23, 1921, 42 Stat. L. 222-3) that Section 3450, Revised Statutes, must stand repealed under the doctrine of the case of *United States* v. *Yuginovich,* 256 U. S. 450. Section 5 of the Willis-Campbell Act, *supra,* re-enacted such previous statutes that were not in direct conflict with the National Prohibition Act, and in *United States* v. *Stafoff,* 260 U. S. 477, it was held that certain of the previous criminal statutes were revived by the adoption of the Willis-Campbell Act. But this court in the *Stafoff* case did not deal with Section 3450, and in *Brooks* v. *United States,* 260 U. S. 481, decided at the same time, this court expressly declined to determine whether the Willis-Campbell Act re-enacted the revenue laws generally.

Whether the provisions of Section 3450, Revised Statutes, authorizing the seizure of automobiles concealing liquor with the intent to defraud of a tax were re-enacted by the Willis-Campbell Act is dependent upon whether or not the provisions of Section 3450 of the Revised Statutes

are in conflict with the provisions of Section 26 of the National Prohibition Act. The Willis-Campbell Act re-enacted all laws "except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act". Mr. Justice Brandeis sets forth in his opinion in the *Ford Coupe* case his reasons for believing that Section 3450 of the Revised Statutes is not in conflict with Section 26 of the National Prohibition Act, but Mr. Justice Stone in his concurring opinion says:

> "but I cannot subscribe to those expressions in the opinion which seem to suggest that the two sections are not in direct conflict. In a case where there is transportation of liquor in a vehicle in violation of the National Prohibition Law, with intent to defraud the United States of a tax * * * it appears to me that the conflict in such a case is direct, and that Section 26 by its terms is controlling."

and Mr. Justice Butler in his dissenting opinion, in which he was joined by Mr. Justice McReynolds and Mr. Justice Sutherland, says:

> "There is direct conflict between Section 26 and Section 3450 in respect to the disposition of vehicles seized * * * and the decisions of the lower courts are overwhelmingly to the effect that Section 26 N. P. A. and R. S. 3450 are in direct conflict."

Mr. Justice Butler then proceeds to set forth his arguments in refutation of those advanced by Mr. Justice Brandeis, citing the authorities in support thereof.

Seemingly the Circuit and District Courts have difficulty in determining whether this court has definitely held the two statutes to be in conflict, in view of the close division of this court on the point, and the unqualified state-

ments of Mr. Justice Brandeis and Mr. Justice Butler on the two sides of the question, and the statement by Mr. Justice Stone in his concurring opinion wherein he does not say definitely that the majority support Mr. Justice Brandeis in holding that there is a conflict. His language is that he cannot subscribe to the expressions in the opinion "*which seem to suggest*" that the statutes are not in direct conflict.

The District and Circuit Courts which continue to hold that there is a direct conflict feel that they are not, by so doing, running counter to the decision of this court in the *Ford Coupe* case, because of this suggestion by Mr. Justice Stone in his concurring opinion. Apparently these courts consider that question remains open.

Before the decision in the *Ford Coupe* case by this court, it was generally held that the two sections were in conflict.

> "All the decisions of the lower courts are overwhelmingly to the effect that Section 26 of the National Prohibition Act and R. S. Section 3450 are in direct conflict. It is so held by the Circuit Courts of Appeal of the Second, Fifth, Sixth and Eighth Circuits, by the Court of Appeals of the District of Columbia, and the Ninth Circuit has certified the question here in Port Gardner Investment Company *v.* United States."
>
> (Mr. Justice Butler's dissenting opinion in *Ford Coupe* case.)

Since the decision in the *Ford Coupe* case by this court, the Second Circuit in *Commercial Credit Corporation* v. *United States* (C. C. A. 2d), 1927, 18 Fed. (2d) 927, has said, at page 29:

> "In the case at bar are present all the facts alluded to by Justice Brandeis as missing in the case

under consideration by him. Lamonica and Calabresse were discovered in the act of transporting liquor in violation of law. Forthwith, under Section 26, it became the duty of the officer to seize the liquor, to take possession of the vehicle, to arrest the persons in charge thereof, to proceed at once against them 'under the provisions of this title,' and to hold the vehicle (unless the owner should give bond) to abide the result of the trial of the persons arrested. All of these duties were fully performed except the last mentioned. That duty has been violated if it be assumed that the Prohibition Administrator ceased, on December 9, 1926, to hold the vehicle to await the outcome of the prosecution and thereafter held it under the provisions of section 3450. *In these circumstances, we believe there is a direct conflict between the two sections in question, and that section 26 must control the disposition of the vehicle.* This view was very clearly stated by Mr. Justice Stone in his concurring opinion in the Ford Coupe case. The same view is expressed by Mr. Justice Butler in his concurring opinion in Port Gardner Investment Co. case, *supra.*" (Italics ours.)

The Fifth Circuit Court of Appeals, from which the *Ford Coupe* case was appealed to this court, has again said in *United States* v. *General Motors Acceptance Corporation* (C. C. A. 5), 1928, 25 Fed. (2d) 238, at page 239:

"Assuming that it is possible to prove that one who uses a vehicle in the removal or for the deposit or concealment of untax-paid liquor has the necessary intent under section 3450 to defraud the United States of a tax which existing law neither requires nor permits to be paid, it is nevertheless true that, if a person be caught in the act of unlawfully transporting liquor in a vehicle, there is no authority of

law to proceed under section 3450, either to prosecute the person or to forfeit the vehicle. Under such circumstances it is apparently recognized in United States *v.* One Ford Coupe, *supra*, that section 26 is exclusively applicable. In that case it was said that there was no allegation that the automobile had been discovered or was being used in unlawful transportation, or that the driver had been prosecuted. Here there was proof or admission that the driver was discovered by the arresting officers in the act of illegal transportation of liquor in the automobile sought to be forfeited."

One of the most exhaustive and thorough decisions on the question, which was handed down before the decision of this court in the *Ford Coupe* case, was that of the Sixth Circuit in *Commercial Credit Company* v. *United States* (C. C. A. 6) 1925, 5 Fed. (2d) 1, where the court says, at pages 4, 5 and 6:

> "Thus the Lewis case ceases to be continuing authority, but the question whether there is direct conflict between the National Prohibition Act and this part of section 3450, or any other provision of the old law on which forfeiture by section 3450 depends, remains open."
>
> • • • • • •
>
> "The 're-enactment' made by the Willis-Campbell Act is not of all laws that may have been impliedly repealed by the National Prohibition Act, but only of 'all laws in regard to the manufacture and taxation of and traffic in intoxicating liquors' and 'penalties for violation of such laws.' Only by the broadest construction can section 3450 be brought within this classification."
>
> • • • • • •

"Our conclusion is confirmed—indeed sufficiently supported—by a comparison of the rights of the parties under section 26 and under section 3450, as the latter is construed by the government to reach mere transportation and as it has been interpreted in the Goldsmith Grant case. With reference to the effect upon the same act of the one transporting, there is no difference to him between the two sections; under either he loses every right he has in the vehicle. It is otherwise with reference to the good-faith mortgagee, or title holder. Section 3450 says his rights shall be forfeited; section 26 says they shall not. Could inconsistency be more clearly 'conflict' or 'conflict' more surely 'direct'?"

IV.

Practical administration of justice necessitates forfeiture proceedings under Section 26 N. P. A. instead of R. S. Section 3450.

The policy of this Court in construing statutes is very aptly put in *United States* v. *Katz*, 271 U. S. 354, at page 357, as follows:

> "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

In the dissenting opinion in *Carroll* v. *United States*, 267 U. S. 132, at page 163, it is said:

> "The damnable character of the 'bootlegger's' business should not close our eyes to the mischief

> which will surely follow any attempt to destroy it by unwarranted methods."

From expressions that appear in the District and Circuit Court decisions, it is evident that many of these Courts still regret that Section 3450 is in fact being used to enforce the National Prohibition Act, and not to protect the revenue. Throughout the decisions may be found expressions similar to that which appears in the report of *United States* v. *General Motors Acceptance Corporation* (C. C. A. 5), 25 Fed. (2d) 238, where the court says:

> "Assuming that it is possible to prove that one who uses the vehicle in the removal or for the deposit or concealment of untax-paid liquor has the necessary intent under Section 3450 to defraud the United States of a tax *which existing law neither requires nor permits to be paid* * * *." (Italics ours.)

and such expressions as appear in *United States* v. *One Dodge Coupe* (D. C. Mass.), 34 Fed. (2d) 942, where the court says:

> "In the present case the liquor was outlawed property. To disclose it to government officers would have exposed it not to taxation but to immediate forfeiture."

These Courts have difficulty in accepting the statement which appears in many of the reports of this Court, that "Congress may tax that which is prohibited". They continue to view that tax, as does Mr. Justice Butler, as a penalty; and as was said by Judge Slick in *United States* v. *One Buick Coach Automobile*, 34 Fed. (2d) 318:

> "The whole atmosphere of this case forces the conclusion that the government is attempting to pro-

ceed under an old revenue statute for the very purpose of cutting off the rights of innocent lienholders."

If resort to Section 3450 does not appeal to the spirit of justice, equity and common sense in the judges of so many of our District and Circuit Courts, how can it be expected that the automobile dealers will have respect for a law to enforce which technical advantage is taken of an old revenue statute to the injury of the innocent automobile dealer? In every city, town, hamlet and cross-road of these United States there are automobile dealers. Every one of them, no matter how careful he might be, or how innocent he might be, has his property in jeopardy the same as the petitioner in the case at bar, if the government is to be permitted to construe Section 3450 as applicable to these prohibition cases. During 1929 there were 4,374,923 new automobiles and trucks registered in the various states, and there were 3,655,000 second-hand automobiles registered in the various states, and in about seventy-five per cent of these over 8,000,000 automobiles, the automobile dealer, the finance company and the bank had a very sizable equitable interest. That interest is in constant jeopardy under the constructions which the government makes of its right to use Section 3450.

Regardless of the close differences of opinion in this court and in all of the courts as to the technical distinctions that are made, it cannot be expected that the automobile dealer will accept them and support the enforcement of the prohibition law when the result is to unnecessarily deprive him of his property in the enforcement of that law. It will mean nothing to him to say that this court in *Goldsmith-Grant* v. *United States* has attributed to his automo-

bile a personality and a facility "as an aid to the violation of the law", and to tell him that under the *Ford Coupe* case his automobile has been guilty of concealing liquor to defraud of a tax, which neither he nor the wrongful user of his car can pay, but which tax under *Regal Drug Company* v. *Wardell*, 260 U. S. 386, was previously regarded as a penalty. It may be reassuring for him to know that if the wrongdoer is acquitted of concealing the liquor in the car with intent to defraud of a tax, previous to the proceedings against the car, then the acquittal of the wrongdoer is an acquittal of the car.

Coffey v. *United States*, 116 U. S. 436;

but if proceedings are first had against the car and it is forfeited, and subsequently the wrongdoer is acquitted, then the forfeiture of his car must stand, notwithstanding the acquittal of the wrongdoer, because of the proceedings being separate, one *in personam* and one *in rem*.

Van Oster v. *Kansas*, 272 U. S. 465.

If, however, his car happens to be within the jurisdiction of the Second Circuit, and proceedings are pending against the wrongdoer, then his car cannot be forfeited until those proceedings are concluded.

Commercial Credit Corporation v. *United States* (C. C. A. 2), 18 Fed. (2d) 927;

but if he should happen to be within the jurisdiction of the Fourth Circuit, and proceedings were delayed against the individual until his car was first forfeited, then he would lose his car.

United States v. *Commercial Credit Company* (C. C. A. 4), 20 Fed. (2) 519;

or if his car should have happened to be within the jurisdiction of the Ninth Circuit, then it would have been a matter of serious consequence to the dealer as to whether or not the car happened to be standing still before it started to transport the intoxicating liquor, or whether it was standing still after it had transported the intoxicating liquor, and whether or not, regardless of transportation, the prohibition agent might not have seen the car moving. The dealer must be told that these seemingly inconsequential incidents will either call for an absolute forfeiture of his property under Section 3450, or the protection of his rights under Section 26.

See

United States v. *One Studebaker Coach* (C. C. A. 9), 32 Fed. (2d) 866;

Commercial Credit Company v. *United States*, 33 Fed. (2d) 228;

Davies Motors, Inc. v. *United States*, the case at bar.

Certain it is that the efforts of the President of the United States to encourage respect for law and obedience to law will not receive much assistance from such people as these automobile dealers if in order to enforce the prohibition law, the Government still resorts to this old revenue statute 3450, in utter disregard of the property interests of these innocent dealers in automobiles.

It must be kept in mind that it is only the innocent dealer that is protected under Section 26 of the National

Prohibition Act. The guilty are punished under both acts. But the anomalous result is reached, as in the case at bar, that by proceeding against the wrongdoer and the car under Section 3450 instead of under the National Prohibition Act, the innocent suffer greater punishment than do the guilty. For instance, in the case at bar, the guilty transporter or concealer of the liquor was fined $250. The innocent automobile dealer has lost his investment of over $800. That results because the forfeiture proceedings under Section 3450 forfeit absolutely all the rights of the innocent in the automobile, notwithstanding their value, whereas punishment of the individual under that section is limited to a fine or penalty of not more than $500. Procedure under this section encourages violation of the law. A wrongdoer will know that if he can only secure some finance company or innocent dealer to carry the largest equitable interest in the car, then it is the innocent dealer or finance company who will suffer the most, and he, the wrongdoer, can take his chances on a fine not exceeding $500.

Continued forfeitures under Section 3450 are going to aggravate the blocking of the court dockets, which is already a serious problem. These dealers have a right to insist upon a jury trial in each of these forfeiture cases, and they have a further right to insist that the government must prove actual intent to defraud of a tax, before a forfeiture can take place.

See

United States v. *One Dodge Coupe* (D. C. Mass.) 34 Fed. (2d) 942;

United States v. *One Buick Coach* (N. D. Ind.) 34 Fed. (2d) 318;

United States v. *One 6-Ton Wichita Motor Truck, etc.* (S. D. N. Y.), 37 Fed. (2d) 617.

They will be forced to resort to such proceedings in order to protect their rights under the law, if this court holds that Section 3450 is the applicable statute.

From an analysis of these cases we therefore learn that by prosecutions under 3450 it is possible for the innocent to be punished, while the guilty escape, under the doctrine laid down by this court in *Van Oster* v. *Kansas*, 272 U. S. 465, and by the Fourth Circuit in *United States* v. *Commercial Credit Company*, 20 Fed. (2d) 519; and in any event the innocent are punished more than the guilty, under the very provisions of the statute itself, where their rights are absolutely forfeited, and the wrongdoer is limited to a fine of $500. Since the National Prohibition Act sufficiently provides for its own punishments, and the protection of the innocent parties, that act should be respected and alone enforced, and should not need the aid of forfeitures under Section 3450.

To hold that forfeitures must be under Section 26 of the National Prohibition Act instead of under Section 3450 will in no way embarrass the government under its customs seizures, as the Solicitor General urged before the court in the other cases. The Tariff Act of 1922 with respect to customs was enacted after the National Prohibition Act, and after the Willis-Campbell Act, and supersedes any previously enacted prohibition statutes, so that the holding that Section 26 must be applied in connection with cars used to transport liquor into the United States would not control with respect to customs seizures.

See

Charles Zimmerman Sons Company v. *Ferguson* (E. D. Mich.), 16 Fed. (2d) 604;
United States v. *Cardwell*, 9 Fed. (2d) 146.

Furthermore, transportation under Section 26 of the National Prohibition Act refers only to acts within the boundaries of the United States, and not to smuggling across the border.

Accordingly it is submitted that the practical administration of justice requires forfeitures under Section 26 instead of R. S. 3450.

V.

Summary of previous arguments on penalties versus taxes in view of new tax law.

In view of the fact that the present Revenue Act of 1926, placing a tax of $6.40 on each gallon and reading practically the same as the statute which was considered by this court in *Regal Drug Company* v. *United States*, differs from the Act of 1921 which placed a tax of $2.20 on non beverage, with an additional tax of $4.20 when diverted to beverage purposes, and which later tax law was considered by this court in the *Ford Coupe* case, it may be possible that the court will want to reconsider the question of taxes versus penalties in the *Ford Coupe* case. As the *Ford Coupe* case now stands, it runs squarely contra to the previous decisions of this court in *Regal Drug Company* v. *United States*, as is pointed out by Mr. Justice Butler in his dissenting opinion, and it is so now, particularly in view of the change in the language of the tax law.

Accordingly for the information of the court a summary of the brief on that point, filed at the re-argument of the *Ford Coupe* case, is herewith given.

1. The nature and character of the revenue laws, particularly Section 3450 Revised Statutes, insofar as they relate to beverage liquors, were changed upon the adoption of National Prohibition Act, so that the laws originally intended to protect revenue (taxes) by the change became laws in aid of prohibition (penalties).

See

Fontenot v. *Accardo*, 278 Federal 871;
Regal Drug Company v. *Wardell*, 260 U. S. 386.

2. Congress intended the revenue laws as penalties only upon a prohibited business and not upon a lawful ownership of innocent conditional vendors and mortgagees of automobiles. This is evidenced by the use of the words "diverted" and "diversion" in 26 U. S. C. A. 245, (4), and by the machinery set up in the National Prohibition Act for its own enforcement. Congress did not intend to confiscate the property of innocent parties, as is shown by Section 26 of the National Prohibition Act.

3. The dictum in *United States* v. *Yuginovich*, 256 U. S. 450, that Congress may under the broad authority of the taxing power tax that which is prohibited is not supported by the authorities cited therein. *License Tax Cases*, 5 Wallace (72 U. S.) 462; *In re Kollock*, 165 U. S. 526; *United States* v. *Jim Fuey Moy*, 241 U. S. 394; *United States* v. *Doremus*, 249 U. S. 86, as analyzed, show them to be in support of revenue measures and not penal statutes.

4. The revenue feature has always been the controlling influence to determine whether a statute is a tax measure, and according to eminent authority should be the only influence in determining if there is a tax in fact.

D. A. Wells—*Theory and Practice of Taxation;*
Cooley on *Constitutional Limitations;*
John Randolph Tucker—*Constitution of the United States;*
Story—*Commentaries on the Constitution.*

5. The framers of the Constitution intended that the taxing power should be used for purposes of revenue only.

Jefferson's Correspondence, Vol. 4;
The Federalist.

6. The power to make money exactions as regulatory measures, such as in *Veazie Bank* v. *Fenno,* 8 Wallace (77 U. S.) 533, is to be found in the implied authority of the specific general powers given to Congress, and not in the taxing power.

Head Money Cases, 112 U. S. 580;
Cooley on Taxation;
Taxation for the Purpose of Destruction, by J. B. Waite, 6 Michigan Law Review 277;
The National Police Power under the Taxing Clause of the Constitution, by R. E. Cushman, 4 Minn. Law Review 247;
Indirect Encroachment on the Federal Authority by the Taxing Powers of the States, by Thomas R. Powell, 31 Harvard Law Review 321;
Is there a National Police Power? by Paul Fuller, 4 Columbia Law Review 563;
Covert Legislation and the Constitution, by Judge Charles M. Hough, 30 Harvard Law Review 801.

7. Where private property is taken solely as a punishment, it is under the penal power as distinguished from the taxing power of the Government.

See

Seligman—*Essays in Taxation;*
The King v. *Barger* (Australian Case), 6 Commonwealth L. R. 41;
Child Labor Tax Case, 259 U. S. 20;
Trusler v. *Crooks,* 70 Law Ed. 198, 269 U. S. 475;

and as a penalty if enforced against innocent parties without due process of law, it is a violation of the Fifth Amendment.

Regal Drug Co. v. *Wardell,* 260 U. S. 386;
Lipke v. *Lederer,* 259 U. S. 557.

VI.

Interpreting Section 26 as mandatory aids and does not retard prohibition enforcement.

Congress recognized that in our great social experiment of prohibition it was dangerous to go counter to reason and justice. Accordingly in Section 26 it safeguarded the innocent from the deodand theory used by the courts in forfeitures under Section 3450 to support the public revenue.

The guilty are punished under the Prohibition Act more severely than they are under R. S. 3450, but the opposite is true as to the innocent Why, then, should not the car be prosecuted under Section 26 so as to protect the innocent, instead of under Section 3450, where the only re-

sult is to confiscate property of the innocent? Extending the "deodand" theory—the giving of a personality to a thing—beyond the revenue statutes, and using it in fact, if not in theory, in support of prohibition is filled with great danger.

We believe that this court should give serious consideration to the efforts of Congress under Section 26 to protect the innocent.

Respectfully,

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